

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CARING HANDS HEALTH EQUIPMENT &
SUPPLIES, LLC,

Plaintiff,

v.

U.S. DEPARTMENT OF VETERANS
AFFAIRS,

**Serve: The Honorable Jessi K. Liu,
U.S. Attorney for the District of Columbia)
555 4th Street, N.W.
Washington, D.C. 20530**

Case No. _____

**The Honorable William Barr
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530**

**The Honorable Robert L. Wilkie
Secretary of the Department of
Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420**

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

This action is brought under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), as amended, to require release by the United States Department of Veterans Affairs (“VA”) of records requested over three (3) years ago under FOIA, as to which the VA has not timely asserted any FOIA exemption, or otherwise sought an extension of time in which to provide required release.

JURISDICTION AND VENUE

1. This Court has jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 522(a)(4)(B). Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) and under 28 U.S.C. § 1391(e) because, among other reasons, defendant VA has its headquarters within this district.

THE PARTIES

2. Plaintiff Caring Hands Health Equipment & Supplies, LLC is a South Carolina limited liability company with its principal place of business in Ridgeland, South Carolina.

3. Defendant Department of Veterans Affairs is a federal government agency within 5 U.S.C. § 552(f)(1) and the FOIA.

STATUTORY FRAMEWORK

4. FOIA requires federal agencies to release requested records to the public unless a specified and properly applicable statutory exemption is timely asserted. 5 U.S.C. § 552(a)(3). The VA is an agency within the meaning of 5 U.S.C. § 551(f)(1).

5. Agencies must respond to a FOIA request within twenty (20) business days by, at a minimum, notifying the requestor of its determination as to whether to provide the records sought and the reasons therefore, and of the requester's right to appeal any negative determination by the head of the agency. 5 U.S.C. § 552(a)(6)(A)(i).

6. An agency may delay its response, but only "[i]n unusual circumstances" and provided written notification to the requester sets forth those unusual circumstances along with a date on which the agency's decision will be provided. 5 U.S.C. § 552(a)(6)(B)(i). In other words, the agency by statute is not permitted to delay indefinitely.

STATEMENT OF FACTS

7. Plaintiff, by letter dated December 1, 2015, requested, pursuant to the FOIA, copies of certain records related to procurements of Durable Medical Equipment Services by VA Veterans Integrated Services Network – Southeast Network 7 (“VISN 7”) from January 2015 to the date of the letter. That letter, attached hereto as **Exhibit A**, was filed via VISN 7’s centralized FOIA email address: VISN7OfficeFOIARequests@va.gov.

8. As of October 31, 2017, Plaintiff had received no response to its FOIA request. Also, as of October 31, 2017, more than twenty working days had passed after receipt by Defendant of Plaintiff’s FOIA request. Accordingly, Plaintiff, via email to VISN 7 FOIA Officer Orlando Dunson (“Dunson”) requested an update on the status of the December 1, 2015 FOIA request. That email is attached hereto as **Exhibit B**.

9. Dunson responded the same day stating, “[d]ue to end of fiscal year (Sept. 30th) reporting, I had to slow down in processing your FOIA. Now that the month is over (reporting is complete), I can begin to ramp up again processing your FOIA amongst my other duties. Your FOIA has not been forgotten. It is by far the largest I have ever processed.” *Id.*

10. On February 7, 2018, Plaintiff, via email through counsel, requested production of the responsive documents that had been gathered by VISN 7 thus far. That email, the first in the email chain attached hereto as **Exhibit C**, notified Dunson that the request had been pending for over two years and asked for production of at least the documents currently in VISN 7’s possession by February 20, 2018.

11. Dunson responded the same day stating, “[t]his voluminous FOIA request remains in a backlog status and is tracked weekly by VA Central Office in Washington DC [sic]. Thank you for your patience.” *Id.* Plaintiff’s counsel responded that such a response was insufficient

and reiterated the request to start producing documents by February 20, 2018. *Id.* Dunson responded by asking VA legal counsel to be added to the message, stating, “I will not respond to anymore inquiries associated with this request.” *Id.*

12. While Plaintiff has attempted to contact VA legal counsel and endeavored on many occasions to obtain production of the records sought under this request, VA legal counsel has never responded.

13. By letter dated February 12, 2018 and attached hereto as **Exhibit D**, Defendant for the first time officially acknowledged and assigned a FOIA request tracking number. The letter stated that the request would be placed in the, “complex processing track... based on the amount of work and/or time required to process [the] request” *Id.* (emphasis in original). Despite quoting Plaintiff’s December 1, 2015 request as seeking disclosures from “January 2015 to present,” Defendant’s letter indicated that the date range for the record search would be, “[f]rom 01/01/2015 To 11/3/2015.” *Id.* (emphasis added).

14. By letter dated March 6, 2018 and filed via the VA Office of General Counsel’s FOIA Appeals centralized email address, Plaintiff, through counsel, formally appealed the Defendant’s failure to respond to and constructive denial of Plaintiff’s FOIA request. *See* letter attached hereto as **Exhibit E**.

15. By letter dated April 5, 2018, VA Office of the General Counsel advised Plaintiff that, “[t]o date VISN 7 has not been able to provide a firm date for completion of the FOIA and has not yet issued your client an Initial Agency Decision on the December 2015 request. *Therefore, we cannot conclude that a reasonable search for responsive records was conducted or that any responsible documents are being appropriately withheld....* Accordingly, we are directing VISN 7 to communicate directly with you within 10 business days... regarding the scope of your

request... and to establish a reasonable timeframe for production of any documents responsive to your request that are not exempt from disclosure.” *See* letter attached hereto as **Exhibit F** (emphasis added).

16. On June 1, 2018, via a voicemail left for Plaintiff’s counsel, Cindy Siegler, ostensibly a VISN 7 employee in the FOIA office, stated that she had been assigned to Plaintiff’s FOIA request and stated that a substantive response to the request would be received by June 30, 2018.

17. Defendant has failed to produce any records that were responsive to Plaintiff’s FOIA request, or otherwise to provide any conceivable legal grounds for demonstrating, or even to simply assert that responsive records are exempt from production. Further, Defendant, as of this filing, has provided no hint as to any date or projected date upon which any responsive records will be produced. Despite the Defendant stating that it would provide an update on the status of the request on June 30, 2018, Plaintiff has received no further communications from the Defendant about the request since June 1, 2018.¹

18. Because Defendant has failed to comply with the time limit set forth in 5 U.S.C. § 552(a)(6)(A) and failed to extend that time limit pursuant to 5 U.S.C. § 552(a)(6)(B), Plaintiff is deemed to have exhausted any and all administrative remedies as to its FOIA request. 5 U.S.C. § 552(a)(6)(C)(i). Plaintiff, having undertaken every measure to facilitate response administratively, has been left with no choice but to bring this action.

¹ Plaintiff did however receive copies of Defendant’s requests for objection to Plaintiff’s FOIA request which were sent to no less than 26 private businesses whose procurement related information could be released should the request be granted in full.

COUNT I – VIOLATION OF THE FREEDOM OF INFORMATION ACT

19. Plaintiff re-alleges the allegations of the preceding paragraphs as if fully set forth herein.

20. Defendant has violated FOIA by failing to produce any, much less all, non-exempt records responsive to Plaintiff's FOIA request within the 20-day period required by 5 U.S.C. § 552(a)(6)(A)(i) by failing to demonstrate that any withheld records responsive to the request are exempt from production, or by even identifying exemptions, if any, which Defendant contends are applicable to the FOIA records requested.

21. While Defendant has confirmed in writing that the requested records were long ago retrieved and are under review, Defendant has violated FOIA by providing Plaintiff no notice as to any circumstances, unusual or otherwise, and no date on which its decision is expected to be dispatched. *See* 5 U.S.C. § 552(a)(6)(B)(i). Plaintiff is being irreparably harmed by reason of Defendant's violation of FOIA and disregard for the simple and clearly stated requirement of this law, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to conform their conduct to the law.

REQUESTED RELIEF

WHEREFORE, and consistent with the mandatory provisions of the Freedom of Information Act, Plaintiff respectfully requests that the Court:

- (a) declare Defendant's failure to comply with FOIA to be unlawful;
- (b) order Defendant to produce all records known to be responsive to Plaintiff's FOIA request;
- (c) preclude Defendant, at this late date, from interposing additional delay by asserting allegedly applicable FOIA exemptions; provide for expeditious proceedings in this action;

- (d) enjoin Defendant from continuing to withhold records responsive to the requests;
- (e) award Plaintiff attorneys' fees and litigation costs reasonably incurred in this action as authorized by 5 U.S.C. § 552(a)(4)(E)(i);
- (f) retain jurisdiction over this matter to resolve any disputes over the proprietary of exemptions, if any may be claimed; and
- (g) grant Plaintiff such other relief as the Court deems appropriate.

Respectfully submitted,

/s/ Edward J. Tolchin
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